

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HPM CORPORATION

and

SARA J. DANEMAN, TRUSTEE IN BANKRUPTCY
FOR HPM CORPORATION

and

Case 8--CA--32647

DISTRICT LODGE 54, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, AAW INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Mark F. Neubacker, Esq., for the General Counsel.
David A. Kadela and Daniel W. Srsic, Esqs.,
(*Little Mendelson, P.C.*) of Columbus, Ohio,
for the Trustee.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Shelby, Ohio on June 3, 2003. The charge and first amended charge were filed on August 3 and November 1, 2001¹ and the amended complaint and notice of hearing (the complaint) was issued on May 2, 2003.

The complaint alleges that HPM Corporation (HPM) violated Section 8(a)(5) by failing to provide the Union with certain requested information and failed to bargain with the Union concerning the effects of the closing of operations on unit employees. Although HPM did not file an answer to the complaint, the General Counsel did not file for a default judgment against it. Instead, he has chosen to litigate the matter.

The complaint also alleges that Sara J. Daneman (the Trustee) was appointed by the United States Bankruptcy Court on August 29 to be trustee in bankruptcy "with full authority to continue Respondent's operations and to exercise all powers necessary to the administration of HPM's business;" it alleges that the Trustee violated the Act in the same way as HPM. The complaint does not, however, allege that the Trustee was an alter ego and single employer with HPM. The uncontested facts, as more fully described below, did not show that Trustee had "full authority to continue Respondent's operations and to exercise all powers necessary to the administration of HPM's business." Because the General Counsel did not plead that the

¹ All dates are in 2001 unless otherwise indicated.

Trustee had any other connection with HPM, at the outset of the hearing I dismissed the allegations concerning the Trustee from the complaint. The General Counsel does not address this matter in his posthearing brief, so I shall not discuss the matter further either. The General Counsel also argued the Trustee was HPM's agent for purposes of service and I allowed him to develop the record on that issue.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Trustee, I make the following

Findings of Fact

I. Jurisdiction

HPM operated a facility in Mt. Gilead, Ohio where it manufactured and refurbished injection molding, die cast, and extrusion systems. During the year 2000, HPM manufactured, sold and shipped machinery valued in excess of \$50,000 to businesses such as Leggett and Platt, Hayes Albion, and Continental Plastics located outside the State of Ohio. During that time HPM's gross revenues exceeded one million dollars.²

Local 1319, International Association of Machinists and Aerospace Workers has represented HPM's employees in a production and maintenance employees unit.³ As will be described in more detail, HPM operations were closed. After the closure Local 1319's assets were transferred to another local of the Machinists. I conclude that District 54 is, and Local 1319 was at all material times, a labor organization within the meaning of Section 2(5) of the Act.⁴

II. Alleged Unfair Labor Practices

A. Facts

William Flickinger began working for HPM in October 1968. He began as an engineer, advanced through the ranks and in 1993 until 1996 he was HPM's president, chief executive officer, and chairman of the board. In 1996 HPM was acquired by HPM Stadco and Flickinger remained president but he no longer served as chief executive officer or chairman of the board.

HPM's financial situation had been in a state of decline for several years. It lost significant amounts of money each year beginning in 1996. All of its assets, including inventory, receivables, books and records, and equipment, were pledged as collateral for a line of credit from Fleet Financial. While at one time HPM employed over 500 workers, as of 2000 HPM employed only 200--250 employees. On January 28, Fleet Financial terminated its line of credit to HPM. From February 1 to June 29 Fleet Financial only funded HPM on a weekly basis based on the collection of receivables. This reduced the cash available and caused severe layoffs.

² These facts are based on the uncontested testimony of William Flickinger, HPM's president at the relevant times.

³ The complaint also alleges that a separate unit existed at all material times in Marion, Ohio. Yet the uncontested record indicates that facility closed in 1999 and part of that unit was merged into the Mt. Gilead unit. No further explanation of this pleading is provided in the record or in the General Counsel's brief.

⁴ These facts are based on the uncontested testimony of Thomas Frisbie, District 54's president.

On April 5, Fleet Financial required HPM to sign documents allowing it take control of HPM's assets upon request. Also in April Fleet Financial took mortgages on the HPM's property. By late April and early May HPM employed less than 100 persons. On June 20, Fleet Financial advised HPM that it would stop all funding on June 29 and that it planned to take control of the assets at that time. All remaining hourly employees were laid off. This effectively closed HPM. On July 6 HPM surrendered its assets to Fleet Financial.

On July 11 the Union sent HPM this letter.

I am requesting the names of employees who have earned Vacation Pay and the amount owed to each hourly employee per the Collective Bargaining Agreements between HPM Corporation and HPM Remanufacturing and Local Lodge 1319.

I am also requesting the names of employees who have submitted Insurance claims to either Medical plan, including Dental, Prescriptions, and the amount of unpaid claims for each employee. This is needed to properly represent our Members.

Please provide me with this information by Friday, July 20, 2001.

The Union requested this information after employees complained that their insurance claims were not be processed or paid.

At the time HPM received the request there were no employees still working with HPM who could locate the information and that he did not have possession and control of any records -- Fleet Insurance had taken control of them. However, prior to July 6, when HPM still had control of the records, at the Union's request Flickinger allowed laid-off employees to come to the facility to examine existing records regarding unpaid vacation time. HPM had two health insurance plans. Flickinger explained that HPM did not keep records that were responsive to the Union's information request. Rather, this information was maintained by the health plans.

HPM's assets, including its books and records, were sold by Fleet Financial on July 26 to Taylor Industrial Services. Two days earlier on July 24 the Union sent HPM a letter that demanded "a meeting date to begin effects bargaining over the recent closure of HPM Corporation." This was the first time that the Union had requested bargaining over the effects of the shutdown. Flickinger consulted with his bankruptcy attorney and was advised that the matter was left for the bankruptcy trustee. Flickinger called Fred Gilkinson, the Union's business agent, and told him that HPM was probably going to file for bankruptcy under Chapter 7 in a few days and that HPM could not engage in effects bargaining with the Union because HPM no longer had any assets.⁵ On July 30 Flickinger sent Gilkinson a letter that read:

This confirms our telephone conversation in regards to negotiating a plant closing. While I'm prepared to meet with you now, I believe we both agreed to see what course the Company takes the week of July 30, 2001 before a meeting is set.⁶

⁵ Gilkinson at first testified that he did not recall having such a conversation, but in an affidavit that he had earlier given he does recount such a conversation.

⁶ Gilkinson denied ever agreeing to put the matter over. My conclusion is that the discussion between Gilkinson and Flickinger ended vaguely and each took away different

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Gilkinson replied by letter dated August 1 that provided in pertinent part:

In [a] letter dated July 24, 2001, we requested a date and time to commence Effects Bargaining. To date you have refused to provide that information.

Upon receipt of this letter, please immediately contact me to set a meeting before the end of this week.

Meanwhile, on July 27 Flickinger sent the following memorandum:

TO: All employees and former employees of HPM Corporation

This letter is to notify you that HPM Corporation has no financial ability to maintain employees. You are hereby put on notice that your employment with HPM Corporation is no longer in effect. We thank you for your service with HPM Corporation and we wish you much success in your future.

HPM filed for bankruptcy under Chapter 7 on August 1.

The Union was well aware of HPM's dire financial situation. HPM requested the assistance of the Union's parent organization, the International Association of Machinists, to find additional private equity money to invest in HPM, but the IAM efforts were unsuccessful. Flickinger kept Fred Wilkinson, the Union's business agent, informed of all significant developments concerning HPM's financial situation. This included informing the Union after receiving the June 24 letter that all remaining unit employees would be laid off and the facility would close unless new financing was found.⁷

HPM did not bargain with the Union concerning the effects of the closing. Flickinger explained that at the time the Union requested bargaining concerning the plant closing, HPM had no employees, its assets were taken over by Fleet, and HPM knew that within days it would be in bankruptcy.

B. Analysis

1. Preliminary matters

The Trustee argues that the complaint should be dismissed because the charges and the complaint were not served on HPM. However, the record indicates that both the amended charge and complaint were served on Flickinger at his home address. This gives rise to a presumption that they were received. Flickinger testified yet did not offer any evidence that he failed to receive the amended charge and complaint. I therefore reject this argument.⁸

conclusions. But this becomes unimportant because, as we will see, the Union clarifies the matter the next day.

⁷ These facts are based on Flickinger's credible testimony.

⁸ Respondent also argues that the General Counsel has not authenticated the proofs of service. I disagree. On their face the documents appear to be records that the General

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Respondent then argues that Flickinger was not an employee of HPM when he was served. Flickinger testified that on about July 15 or 16 he resigned from his position at HPM. However, on July 17 Flickinger signed a handwritten note indicating that he was temporarily rescinding his resignation for purposes of signing HPM's impending bankruptcy resolution after which he would be resuming his resignation. Flickinger never notified the Union that he has resigned. Flickinger testified that his employment with HPM ended on August 1, but he admitted that he never informed the Union of that. He also continued to communicate with the Region 8 on behalf of HPM. Because Flickinger continued to act as HPM's agent and did not inform the Union or the General Counsel of any purported resignation, I reject this contention as well.

The General Counsel argues that he is entitled to summary judgment because HPM never filed an answer to the complaint. However, the General Counsel decided to proceed to hearing on this matter despite the fact that HPM had not filed an answer. Even when I dismissed the Trustee from the complaint the General insisted on proceeding to present his case. He contended that he needed to show that the Trustee was an agent for purposes of accepting service despite the fact, as shown above, that service has been made directly on HPM. Now that the record has been developed without objection from the General Counsel it cannot be ignored. The request for summary judgment is denied.

2. Refusal to provide information allegation

As more fully described above, on July 11 the Union requested information concerning information concerning vacation time and health insurance claims. This information is clearly relevant information necessary for the Union to fulfill its role as the collective bargaining representative of the unit employees and HPM may not refuse to provide it. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The remaining question is whether HPM actually refused to provide the information.

At the time the Union made the request HPM had closed operations. It no longer had paid employees. Its assets, including its books and records, were under the control of Fleet Financial as a result of a hostile take over. The Union was well aware of HPM's dire financial condition for months. Earlier, while HPM still had control of the records, it allowed the Union to have full access to them to locate whatever information it sought. I note that since then the books and records have been sold to yet another business and that HPM has filed for bankruptcy. Under these circumstances I conclude that HPM has not refused to provide the information and I shall dismiss this allegation of the complaint.

3. Refusal to bargain allegation

An employer must bargain with a labor organization concerning the effects of shut down on unit employees. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Here the evidence shows that the Union requested bargaining on this matter and that HPM failed to do so.

HPM makes several arguments in an effort to avoid a finding against it. First, it argues that it engaged in effects bargaining with the Union *before* it ceased operations and *before* the

Counsel keeps in the ordinary course of business. Respondent does not contend otherwise.

Union requested bargaining. HPM points to the fact that it kept the Union informed of its deteriorating financial position and also worked together with the Union in efforts to secure new financing. However, this does not amount to effects bargaining and I reject this contention.

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Next HPM argues that the Union waived its right to bargain. It points out how it kept the Union advised of all significant developments and that the Union watched as the work force declined from 500 to 0 and did not request effects bargaining until July 24 and August 1. It argues that the Union was informed on the effects of the June 24 letter from Fleet Financial that resulted in the shutdown of operations in late June yet the Union did not request bargaining until over a month later. I agree. A union is obligated to act with due diligence to request bargaining in a timely fashion. Under the circumstances of this case, where the Union was kept informed all along of HPM's financial situation yet did not request effects bargaining until a month after the facility closed and the assets were seized, I conclude that the Union waived its right.

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15 *Vandalia Air Freight*, 297 NLRB 1012 (1990).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

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ORDER

The complaint is dismissed.

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Dated, Washington, D.C. August 5, 2003

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William G. Kocol
Administrative Law Judge

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⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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